IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8742 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GB SHAH

Versus

GENERAL MANAGER

Appearance:

MR RN SHAH for Petitioner

MR.SIRAJ GORI FOR MR HARIN P RAVAL for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 02/05/2001

C.A.V. JUDGEMENT

1. The petitioner above named working as a Divisional Manager (Assistant Manager) in the employment of the United India Insurance Company Limited, at his present post at Modasa, Sabarkantha - District, has

preferred this petition before this Court under Article 226 of the Constitution of India for appropriate writ, order or direction directing the respondent - Insurance Company, the employer of the petitioner, to promote him to the post of Deputy Manager forthwith and for also a direction for quashing and setting aside the action of the respondent in not promoting the petitioner at the relevant point of time. The petitioner has further prayed for a writ, order or direction for quashing and setting aside the new promotion policy at Ex.B for the officers of the respondent - Insurance Company.

2. Undisputedly, the petitioner has been serving at present as a Divisional Manager at Divisional Office of respondent - Insurance Company at Modasa, Sabarkantha District. The next promotional post from Assistant Manager (Divisional Manager) is the post of Deputy Manager.

3. According to the case of the petitioner, the promotion to the post of Deputy Manager from Assistant Manager is on the basis of seniority-cum-merit for which the respondent considers the confidential report of last three years and as the criteria is seniority-cum-merit, unless and untill an employee has been found positively unfit, the promotion is being given to him. Undisputedly, the respondent has adopted a new promotion policy in the Year-1990 and the effect has been given to the said policy for the first time for the promotees who was promoted in the Year-1990 and onwards. In other words the new promotion policy has been brought into effect from 12th February, 1999 and the promotions have been based on the said policy.

4. As per the case of the petitioner, the relevant provision in the new promotional policy can be enumerated as follows :-

1. Promotion of Officers to the Rank of Manager, Deputy Manager, Assistant Manager and Administrative Officer.

2. After determining the eligibility of Officers as per Para 6.1 of Chapter-II above, panels of such officers shall be prepared in order of seniority, limited to the following proportions;

a. Assistant Administrative Thrice the number

Officer Administrative of vacancies.
Office.

b. Administrative Officers to Assistant Manager -do-

c. Assistant Manager to Deputy Manager -do-

Provided that all eligible officers either belonging to same batch or selected on same date shall be considered, even if the total numbers exceed the above proportions.

Provided further that if the total number of Officers is less than the above proportions, all the eligible candidates shall be considered for promotion.

d. Deputy Manager to Manager. All eligible officers.

3. Selection for promotion shall be based on seniority, Insurance qualifications and merit-cum-growth potential as brought out in performance appraisals. In addition, for promotion to the cadre of Manager there shall be interview before selection. In assessment, maximum weightage in terms of numerical marks for various criteria shall be worked out as under :-

	A.A.O. TO A.O	A.O. TO A.M	A.M. TO DY.M.	DY.MANAGER TO MANAGER
a. Seniority	60	42	30	20
b. Insurance qualification*	10	8	-	-
c. C.R. FORM :				
i. Traits in C.R.	10	15	20	15
ii. Performance	10	15	25	25
iii. Growth Potential	10	20	25	25
d. Interview	-	-	-	15
Total...	100*	100	100	100

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*Note : Marks for Insurance qualification shall come into effect for promotion exercise for 1992 and onwards. Till then "total" marks for A.A.O. to A.O. and A.O. to A.M. shall be 90 and 92 respectively.

4. Interview

5. Promotion Committees:

1. The promotion committee shall mean and include Middle Management Services Committee and Lower Management Services Committee.

2. The Promotion Committees shall comprise of -

For Promotion to the cadre of A.M. to Dy. Manager and Dy. Manager to Manager :

Middle management services committee consisting of the Chairman-Cum-Managing Director of the Company, 2 Managing Directors of the Corporation, Nominee Director from the Government on the Board of the Company and a SC/ST representative nominated by Chairman of the Corporation.

b. For Corporation

For promotion of Officers in the Corporation in Bombay, Corporation, cells and other Officers of the Corporation at various centre, whose names do not appear in the seniority lists of the companies, promotion committee will comprise of Two Managing Directors of the Corporation and one General Manager and a SC/ST representative nominated by the Chairman of the Corporation. The above committee will deal with the promotion in respect of such officers of the Corporation to all cadres upto the level of Managers. However, in respect of such Officers of the Corporation for promotion to the cadres of Deputy Manager and Manager representative of Central Government, as may be nominated by the Ministry of Finance shall also be an additional member of the Committee.

Promotion committees shall also be the Interview Committees to the cadre in respect of which interview is prescribed.

For meeting of promotions committee includes interviews for promotion to the cadre of Manager, the queram shall be three members, provided the Chairman-Cum-Managing Director in case of promotions in Companies and one of the Managing Director in case of promotion in his representation is present in such meetings.

4. Selection

The promotion Committee will study the information contained in the summary sheets and also give suitable weightage either plus or minus for the inconsistences and/or exaggerated remarks as may be observed from the confidential reports/works records of the Officers concerned. Thereafter, the total marks shall be suitably moderated and recorded by the Committee, taking into account the marks secured in interviews, where applicable.

The committee on the above basis shall select officers for promotion and forward a list of such officers to the appointing authority. The list shall be so prepared as to maintain the interse seniority of the concerned officers in the existing cadres. Such selection of officers for promotion by the Committee shall be final.

The promotion committee shall also prepare in respect of each cadre a reserve list equal to the number of retirement due during the period ending 31st March following plus 10% of the declared promotions. Promotions from this list can be made if and when requires before the next promotion exercise. In case of promotion to the post of Manager, such reserve list shall bear at least two names of Officers, so selected. The reserve list shall be published simultaneously with the list of promotion.

The Officers in the reservation who have been offered promotion before the next promotion exercise shall be promoted in such next promotion exercise, subject to satisfactory performance of such officers during the year, in which they were placed in the reserve list, as may be revealed by the performance appraisals. However, their seniority in the promoted cadre shall reckon from the date of selection of all the candidates in

such date of selection of all other candidates in such next promotion exercise, so as to maintain interse seniority of the concerned officers in the existing cadre.

5. The petitioner has challenged the aforesaid policy mainly on the ground that once the promotion is required to be given on the basis of seniority-cum-merits then the respondent could have given details as to how the merits would be counted, that there are many places where it may not be possible to do particular work, that the Offices are different and, therefore, it may not be possible for an officer to maintain a particular standard as envisaged in the new policy and, therefore, the policy is not reasonable.

6. So on one hand, as has been contended, under the guise of seniority-cum-merits, the respondent has introduced new policy with regard to merit and, therefore, the policy is illegal and unreasonable. On the other hand, it has been contended, the merits aspect has many difficulties and, therefore, the policy is not reasonable and rational and, therefore it is required to be struck down. In above view of the matter, the petitioner has come out with a plea that since the new policy is illegal, unreasonable and irrational, the same may be quashed and set aside and the petitioner should be immediately promoted to the post of Deputy Manager from the post of Assistant Manager on the basis of seniortity-cum-merit, without considering the merit has envisaged in the policy referred to herein above.

7. In respect of the aforesaid petition, notice was issued in the first instance and it appears that rule was subsequently issued, it was duly served upon the respondent. Mr.Harin Raval has appeared on behalf of the respondent in response to the service of rule. I have heard Mr.R. N. Shah and Mr.Harin Raval, learned advocates for both the parties and have perused the papers.

8. Mr.R. N. Shah, learned advocate who has appeared on behalf of the petitioner has argued at length that when the policy of seniority-cum-merits is an admitted policy for the promotion from the cadre of Assistant Manager to Deputy Manager, the respondent was bound to consider the seniority first, while considering the case of the petitioner for promotion to the cadre of

Deputy Manager.

9. Mr.R. N. Shah, learned advocate for the petitioner has also argued that the new policy is again based on the seniority-cum-merits, but according to him, the respondent - Company has tried to define as to what merits have been considered for the promotion. That as per the new guideline, more weight has been given to merit and hence instead of treating it as promotion on seniority-cum-merit, it has to be treated to the promotion on merit-cum-seniority and, therefore, the said new guidelines are basically contrary to the principle of seniority-cum-merit.

10. In support of the said arguments, Mr.R. N. Shah, learned advocate for the petitioner has substantially relied upon the decision of the Hon'ble High Court of Rajasthan, in the case of MOHINDRA KUMAR BALI V/S. THE NATIONAL INSURANCE COMPANY & OTHERS, IN S. B. CIVIL WRIT PETITION NO.4881 OF 1996 under Article 226 of the Constitution of India. The said judgment has been delivered by the Hon'ble Justice Mr.Shiv Kumar Sharma on 9th May, 2000. A copy of the said judgment has been shown by Mr.R. N. Shah, learned advocate for the petitioner in support of his arguments.

11. On going through the said judgment, it is found that the above policy was required to be considered by the Hon'ble High Court of Rajasthan. In that decision the Hon'ble High Court of Rajasthan has given decision that the respondent - Corporation in that petition was not justified in introducing the policy in the manner in which it was sought to be done and, therefore, the Hon'ble High Court of Rajasthan was pleased to allow the aforesaid petition of the petitioner and the Hon'ble High Court of Rajasthan has also held that the aforesaid policy was not proper and, therefore, the same was quashed.

12. Mr.R. N. Shah, learned advocate for the petitioner has argued the present matter on behalf of the petitioner on the basis of the said judgment in order to substantiate his arguments that the policy has been treated illegal, irrational and unreasonable. This Court may also hold the very promotion policy accordingly.

13. Now, certain obstacles have to be crossed in respect of the said arguments of Mr.R. N. Shah. First, is that the said judgment has been rendered by the Hon'ble High Court of Rajasthan and in view of the settled legal position, it is amply clear that the said decision is not binding to this Court. Firstly, it has also been rendered by the Hon'ble Single Judge of Hon'ble the High Court of Rajasthan and secondly, it is a judgment delivered by the Hon'ble High Court of Rajasthan and decision of one High Court is not technically binding to the Judge of another High Court. There is no dispute about the said state of affairs and legal position.

14. Another aspect of the case is that the Hon'ble High Court of Rajasthan has considered the aspect of seniority-cum-merit in the said decision and, thereafter it has been observed that by introducing the new policy, it has been indirectly converted into a new policy for promotion as if it is based on merit-cum-seniority, by introducing certain new standard for assessment of performance of the officers by introducing the matter of assessment of merits.

15. Now, if the promotion is to be released on the basis of seniority-cum-merit, it is absolutely clear that ordinarily a candidate ought to be selected for promotion on the basis of seniority and ordinarily a candidate is to be entitled to promotion on the basis of seniority and in absence of any positive demerits in his record.

16. At the same time, the law never says that so far as the merit is concerned, it can never be defined. On the other hand, the merit has been defined and when it is made known to the officers and employees then it cannot be said that the merit cannot be defined and the promotion can not be released on the basis of policy of merit.

17. It may be accepted that when the promotion is to be released on the basis of principle of seniority-cum-merit, the employer cannot refuse to release the promotion and such employer can not apply the principle of merit-cum-seniority. The employer has to apply the principle of seniority-cum-merit in accordance with the rules prevailing at that point of time.

18. In the present case, the principle of seniority-cum-merit is not given a go-bye. The principles has been maintained. At the same time, the word "merit" has been defined and it has been made clear as to how the merit will be assessed. Therefore, before considering the cases of promotion under the new policy it has been made clear that the employers and officers will have to wait for the promotion and that hence forthwith the promotion will not be released solely on the strength of seniority. It is noted that each officers would be assessed as per the details given and the petitioner has reproduced the new policy in petition elaborately which has been reproduced hereinabove.

19. While advancing arguments Mr.R. N. Shah, learned advocate for the petitioner has also submitted that under the new policy 25 marks have been allowed for performance and 25 marks have been allowed for growth potential. It is argued that in different posts and at different stations, such performance would be different and growth potential would again depend upon the local requirement, local atmosphere and local cooperation and further it is argued that at some places, the business would be good and the performance may be treated to be good and at certain other places, the business may not come so easily despite the efforts of the officer, the business may not be very good. In other words, despite similar efforts, one officer at a given station may perform well and another officer at another station may not be able to show similar performance.

20. This may not depend upon the officer himself. After all these are commercial transactions and commercial concerns. Therefore, the officer working at different places have to work hard for getting the business in adequate quantity and quality. On the other hand, this being a commercial concern naturally the periodical figures are being appreciated and are scrutinized by highest authority as per the arguments on behalf of the respondent's learned advocate Mr.Harin Raval. Therefore, while assessing the performance of particular officer, stationed at a particular place, a higher officer and offices will seriously consider the backgrounds of the station where such officer is working. Mr.Harin Raval has also argued that while assessing the performance of such an officer, the work done by the predecessor is considered and, therefore, the performance is not being considered in isolation and comparative figures are not being blindly accepted.

21. Mr.Harin Raval, learned advocate for the respondent has also argued that if the petitioner has been working at a place where it is not possible to have good business on account of local atmosphere, then while considering the case of the petitioner, as argued by the learned advocate for the respondent, the performance of the predecessor will be considered and will have to be considered and will have to be considered on the basis of the local atmosphere and local cooperation.

22. Now, if the performance is not considered in isolation, but it is being considered having regard to the local situation, local cooperation and local atmosphere then it cannot be said that such consideration is illegal, unreasonable and irrational.

23. The same is with respect to the growth potential, and according to the arguments of Mr.Harin Raval, learned advocate for the respondent, the same are not considered in isolation, but are being considered having regard to the potential of a particular local place.

24. If these things are not considered in isolation, but they are being considered having regard to the previous transactions and history of the local situation and these things are to be considered in the background of the past performance by previous officers and when the same is considered objectively on account of different situation in different places of the State, in that event it cannot be said that the policy is not reasonable and is not rational.

25. After all as stated above, the respondent is a commercial concern. Therefore, the business has to remain in the centre, simply because it is a Union Government concern and because it is a state under Article 12 of the Constitution of India it does not cease to be a commercial concern. If a person despite its efforts, fails to reach the required standard, he can so explain to the higher offices, he can explain to higher offices as to the reason why he has not reached up to the standard. Even the higher offices also know as to why the business of a particular station is not upto the standard. Therefore, the business alone in isolation, is not a ground for promotion or no promotion of any

individual officer. Same way when the business is not to the standard, it becomes duty of the person seeking further promotion to explain reason for not touching the minimum standard.

26. As stated above, this being a commercial concern it has to stand to the competition in the market and, therefore, the officers and employees have to work hard and they cannot claim promotion solely on the standard of seniority.

27. Therefore, new policy appear to have been introduced in which the promotion is being released, but the merit has not been kept in darkness. It is positively made clear as to what they mean by the word "merit" and that has already been mentioned in the petition itself which has been reproduced hereinabove for ready reference.

28. Now so far the first count is concerned 30% marks are for seniority. Naturally the persons having more length of service would get more marks. Therefore, there cannot be any difficulty.

29. So far as confidential report is concerned, if an employee or officer find that some entries in confidential report are not proper, he can always represent to the higher authority with appropriate explanation. Therefore, the confidential reports are always important for the assessment of the performance and work of all employees and officers.

30. On one hand, the reporting officer will have to positively assess the confidential report. On the other hand the officer and employees in respect of whom adverse entries are made in the confidential report, they would be at liberty to explain with respect to the adverse remarks in the confidential report.

31. If the performance is good, the confidential report will speak so. On the other hand, if the work is not satisfactory or if there is something adverse, the confidential report will say accordingly. In reality, the confidential report, may be regular annual confidential report or may be special confidential report for some special purpose, would stand as a mirror of the

work done by an official employee during the period concerned by the confidential report.

32. Therefore, the confidential report will clearly show the performance of an employee or officer. Therefore, due weight has to be given and the entries made therein. It is more so when the officer and employee are always at liberty to make representation against any adverse entries made against them. Moreover, it is well settled position that adverse entries are required to be communicated to the person concerned so that appropriate representation can be made by the employee or officer concerned. Therefore, there is nothing wrong if due weight is given to the confidential report.

33. So far as the performance and growth potential are concerned, the same are discussed hereinabove. Therefore, when the officers are working in commercial concern, they have to be vigilant in showing their performance and as such while assessing the performance and growth potential, several aspects are considered as argued by the learned advocate for the respondent, and discussed hereinabove. Therefore, when the performance and growth potential are considered in light of the background as argued by the learned advocate for the respondent, it can hardly be said that this policy is not reasonable.

34. Therefore,it is clear that the petitioner has not been discriminated while implementing the promotion policy in question. The respondent has already defined as to what is meant by merits. Therefore, the seniority, confidential performance and growth potential are not being considered behind the back and without information and intimation to the employee or officer concerned.

35. In the case of UNION OF INDIA AND OTHERS V/S. LT.GEN.RAJENDRA SINGH KADYAN AND ANOTHER, reported in 2000 Supreme Court Cases (L & S) 797, certain observations have been made with respect to the criteria of selection for promotion. There the Hon'ble Supreme Court has laid down that such criteria would fall into three categories are as under :-

1. seniority-cum-fitness,
2. seniority-cum-merit,

3. merit-cum-suitability with due regard to seniority

36. Another case shown is there of SMT. ZARNA P. VAIDYA V/S. THE STATE OF GUJARAT AND OTHERS,reported in 1977 GLT XIV 205. Ordinarily, this Court would not consider a citation of G.L.T., since the G.L.T. does not contain the full text of the judgment. In fact the said matter was decided in favour of the petitioner. However, while dealing with the decision of State of Mysore v/s. Sayed Mahmood, A.I.R. 1968 S.C. 1113. this Court has observed that Their Lordships have explained the purport of the test of seniority-cum-merit by pointing out that inspite of seniority of the officer, junior could be promoted if the person concerned were unfit to hold the post. This Court has also observed that where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of the seniority alone if he was found unfit to discharge duties of the higher post and he may be passed over and the junior officer can be promoted.

37. Even in the case of Union of India and others v/s. Lt. Gen. Rajendra Singh Kadyan & Another (Supra), it has been laid down that annual confidential report can be considered by the selection authority as one of the factors and not the sole factor. It has also been observed that where the entire service profile has been considered by the authorities concerned, Court cannot substitute its own view for that of the authorities while exercising power function and jurisdiction under Articles 226 and 136 of the Constitution of India.

38. In the said decision, the requirement was that there should be experience of commanding corps for at least 1 year. There was a provision of 6 months concession. However, the respondent had actually commanded the corps only for five months and seven days and, therefore, even if a period of six months is waived then also respondent did not stand to the standard laid down and, therefore, it was found that respondent no.1 failed to complete the required period of one year's experience as commander. Therefore, it is very clear that simply because a promotion is sought to be released on the seniority-cum-merits, merit can be defined. It cannot be said that the respondent has acted arbitrarily in defining the word "merit", it is more so when the said new policy was made known to the officers and employee before it was actually implemented.

39. It would be worthwhile to reproduce Clause-3 of the new promotion policy its' proper examination. It reads as follows.

3. Selection for promotion shall be based on seniority, Insurance qualifications and merit-cum-growth potential as brought out in performance appraisals. In addition, for promotion to the cadre of Manager there shall be interview before selection. In assessment, maximum weightage in terms of numerical marks for various criteria shall be worked out as under :-

	A.A.O. TO A.O	A.O. TO A.M	A.M. TO DY.M.	DY.MANAG-ER TO MANAGER
a. Seniority	60	42	30	20
b. Insurance qualification*	10	8	-	-
c. C.R. FORM :				
i. Traits in C.R.	10	15	20	15
ii. Performance	10	15	25	25
iii. Growth Potential	10	20	25	25
d. Interview	-	-	-	15
Total...	100*	100	100	100

*Note : Marks for Insurance qualification shall come into effect for promotion exercise for 1992 and onwards. Till then "total" marks for A.A.O. to A.O. and A.O. to A.M. shall be 90 and 92 respectively.

40. The above clause has made it very clear that the promotion will be released on the basis of seniority, insurance qualification and merit-cum-growth potential as brought out in the performance appraisals. This means

the rule is self explanatory and no further explanation is needed to understand the new policy.

41. So it is very clear that in the present case, the merit is not considered behind the back of the employee what is the meaning of the merit in the minds of the promotional authorities is also made known to the employees and officers and it is not considered behind the back. It would also be seen that the case of the petitioner was considered at the relevant point of time and looking to the overall performance of the petitioner he was not found suitable for promotion at the relevant time and, therefore, he was not promoted. When the respondent has acted in accordance with the new policy and when there is no allegation of violation of that policy rule, it cannot be said that the respondent has acted arbitrarily or illegally. So far as the aforesaid decision of the Hon'ble High Court of Rajasthan is concerned, it was made clear by the learned advocate for the respondent that the said judgment has been carried in appeal and that appeal has been admitted and operation of the said judgment and order of the learned single Judge of the Hon'ble High Court of Rajasthan has been positively stayed in accordance with the orders on 19th May, 2000. In view of the statement, it is very clear that apart from the fact that such judgment is not binding to this Court even operation of the said judgment has been stayed. It is to be considered that the respondent has filed detailed affidavit at page-34 onwards showing as to how the new policy is being applied and as to how the new policy is working with the respondent's employment.

42. It would be relevant to consider the statement at page-35. The petitioner has been promoted to the cader of Deputy Manager in 1993 by order dated 24th June, 1993 and the petitioner has accepted the promotion on 5th July, 1993.

43. It shows that there was no illwill on the part of the respondent in not promoting him. On the contrary it is shown that the respondent has considered the case of the petitioner objectively and as and when he was found suitable, he was promoted to the higher post.

44. Therefore, considering the entire case of the petitioner and having regard to the judgment of the

Hon'ble High Court of Rajasthan referred to hereinabove and in view of the facts and circumstances of the case. I am of the decision that in the present case the new policy is not found to be illegal, unreasonable and irrational and, therefore,it cannot be set aside. It is more so when it is applied through out the country and when the new policy is not found to be unreasonable or irrational, it cannot be set aside by this Court. Once the policy of promotion is not found to be unreasonable, it can not be quashed and so long it stands, the respondent can not be directed to promote the petitioner dehors the Rules of promotion. Consequentl
merit in the present petition and it deserves to be dismissed.

45. Mr.Harin Raval had initially prayed for time for arguing the petition for the respondent stating that the appeal before the Hon'ble High Court of Rajasthan referred to hereinabove, is likely to be disposed of very soon. Nevertheless, he was heard but the pronouncement of judgment was differed at his request in order to know the out come of the said appeal. Till today neither party was stated as to what happened to that appeal.

46. In the facts and circumstances of the case, this petition is ordered to be dismissed. Rule is discharged. No order as to costs.

(D. P. Buch, J.)

(vrp)*